*The original of this document contains information which is subject to withholding from disclosure under 5 U.S. C. § 552. Such material has been deleted from this copy and replaced with XXXXXX's.

United States Department of Energy
Office of Hearings and Appeals

In the Matter of: Personnel Security Hearing	)	
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Filing Date: May 31, 2017	)	Case No.: PSH-17-0039
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Issued: August 8, 2017

Administrative Judge Decision

William M. Schwartz, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization[1] under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled "Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As discussed below, after carefully considering the record before me in light of the relevant regulations and the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, The White House (December 29, 2005) (Adjudicative Guidelines), I have determined that the individual's access authorization should be restored.

I. Background

The individual is employed by a DOE contractor and has held a security clearance since 2003. In January 2016, he was arrested and charged with Aggravated Driving While Intoxicated (DWI). The Local Security Office (LSO) conducted a Personnel Security Interview (PSI) in June 2016, during which the individual described the circumstances that led to the January arrest. Unable to resolve the security concerns raised by that arrest, the LSO referred the individual to a DOE consultant psychologist for an evaluation. The DOE psychologist conducted the evaluation in September 2016 and delivered a report containing his findings to the LSO in October 2016. In that report, the DOE psychologist wrote that, in his opinion, the individual did not currently meet the criteria for any alcohol-related diagnosis. He did find, however, that the individual had not been candid about his current alcohol consumption; although he had asserted that he had abstained from

[1] Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

alcohol since his January 2016 arrest, a laboratory test conducted in September 2016 indicated that he had consumed alcohol within the previous 21 to 28 days.

On April 27, 2017, the LSO sent a letter (Notification Letter) to the individual advising him that it had reliable information that created a substantial doubt regarding his eligibility to hold a security clearance. In the attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of Guidelines E and J of the Adjudicative Guidelines.

Upon receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations to request an administrative review hearing, and I was appointed the Administrative Judge in the case. At the hearing, the LSO presented the testimony of the DOE psychologist, and the individual presented the testimony of six witnesses and testified on his own behalf. In addition to the testimonial evidence, the LSO tendered 15 numbered exhibits into the record (Exhibits 1-15), and the individual submitted six exhibits (Exhibits A-F) into the record. The exhibits will be cited in this Decision as "Ex." followed by the appropriate numeric or letter designation. The hearing transcript will be cited as "Tr." followed by the relevant page number.

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). An individual is thus afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Administrative Judge's Decision

In personnel security cases arising under Part 710, it is my role as the Administrative Judge to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and

security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cited two bases for administrative review of the individual's request for access authorization, Guidelines E and J. Guideline E addresses "[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations" as this "can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information." Guideline E at ¶ 15. Among the conditions set forth in that guideline that could raise a disqualifying security concern is "deliberately providing false or misleading information concerning relevant facts to an . . . investigator, security official, [or] competent medical authority . . ." *Id.* at ¶ 16(b). As a basis for invoking Guideline E, the Notification Letter cites the DOE psychologist's conclusion that the individual's claim of being abstinent was not supported by the September 2016 laboratory results, which established that he had consumed alcohol within the previous 21 to 28 days. Ex. 1 at 1.

The LSO's second basis for its security concern relates to the individual's history of criminal conduct. Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations. Guideline J at ¶ 30. In support of its security concern under Guideline J, the LSO relied on the individual's January 2016 arrest for Aggravated DWI and a series of nine arrests and citations issued between 1996 and 2002, including two arrests for DWI. Ex. 1 at 1-2. These allegations adequately support the invocation of Guidelines E and J, and they raise serious security concerns.

IV. Findings of Fact

A. Guideline E

The individual has not challenged the accuracy of the allegations contained within the Notification Letter regarding his 2016 DWI arrest and his evaluation by the DOE psychologist. At the hearing, however, he explained his actions and his general nature and reputation for honesty and reliability through his testimony and that of others. The individual testified that he told the DOE psychologist he had consumed no alcohol since his DWI arrest nine months earlier, because he was "so worried about losing everything [he] had worked so hard for." Tr. at 80. He knew immediately afterward he had made a "stupid decision." *Id.* at 79. He had in fact consumed three beers at a fundraiser for his child's basketball team eleven days before his evaluation and testing. *Id.* at 30, 92. His wife testified that he called her as soon as he left the evaluation and told her that he had lied to the DOE psychologist. *Id.* at 13. His supervisor at the time of the evaluation testified that the individual reported his misrepresentation to him the next day, explaining that he "was scared." *Id.* at 67. According to the counselor who had treated him after his 2016 DWI arrest, the individual also called her, probably in September 2016, to tell her about the lie. *Id.* at 37. In a later session with her, she recalled the individual reporting that "he just had a flash of different thoughts in his head, and he was scared, and he made a really stupid decision . . . and he beat himself up about it;" in

her opinion, he experienced remorse and guilt about what had happened. *Id.* at 38. The individual further testified that he had spoken to his brother and to his co-workers about his behavior. *Id.* at 82.

Several witnesses testified about the individual's general nature for candor. His wife stated that she can always trust her husband to tell her the truth, because he "expresses all his emotions, and admits everything to me, and he tells me everything he's thinking and going through and what he feels." *Id.* at 14. As an example of his truthfulness and honesty, she related an incident in which he returned to a store because he realized that the cashier failed to charge for the bulky items at the bottom of the shopping cart. *Id.* at 17. His current supervisor praised the individual's forthcoming nature, describing his behavior during his interview. *Id.* at 49. A colleague vouched for the broad-based respect that the individual has earned in his professional work. *Id.* at 58-59. His former supervisor of 14 years stated that the individual has always been honest and trustworthy in their interactions. *Id.* at 66. A lifelong friend spoke about trusting the individual, not only as a friend, but as a coach and mentor to his daughter. *Id.* at 75. His counselor stated that the individual has always been open, candid, and truthful in the course of his treatment program with her. *Id.* at 38. Moreover, the DOE psychologist, while noting the individual's misrepresentation about abstaining from alcohol, concluded in his evaluative report that the falsification did "not appear to be part of a more generalized dishonesty." Ex. 4 at 10. At the hearing, the DOE psychologist testified that his sense at the evaluation was that the individual was honest, and that he was not accustomed to lying. Tr. at 26, 30, 32.

B. Guideline J

At the hearing, the individual addressed his numerous arrests and citations between the ages of 18 and 24. He offered no excuses for his criminal activity. He explained that he was in his "dumb and foolish years" and "screwed up." *Id.* at 84. He stated that his life now revolves around his family—school, basketball, and church—and he no longer has time for socializing with others. *Id.* at 84-85. His counselor testified about what she had learned from him in their sessions: that he was young at the time, and wanted to be cool and fit in with his friends. She then stated that the individual followed a pattern of behavior common of people in their 20s, particularly men, in that he started to settle down, got married, and became a responsible adult. *Id.* at 39. She expressed no concern about his past in light of the life he currently leads, which consists of work, home, working out, children, and coaching basketball. *Id.* at 39, 41.[2]

Testimony at the hearing provided details of the events that led to the individual's January 2016 DWI arrest. His wife explained that she had taken their children to nearby city to watch their son's basketball game. Her husband planned to drive separately and meet them there. A friend of his arrived at their house and her husband drank with him before he set off to meet the family. Later, after leaving the game, the individual was arrested. *Id.* at 15. The individual testified that he had misjudged the situation: he had eaten while drinking the beers, and thought he was able to drive. He failed the field sobriety tests when he was pulled over. *Id.* at 83.

[2] I note that the LSO's enumeration of the individual's criminal history from 1996 to 2002 may be overstated. In his evaluative report, the DOE psychologist wrote that he was inclined to believe that the two DWI arrests listed in the Notification Letter for 2000 and 2001 were in fact a single incident. Ex. 4 at 5.

V. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the individual at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c) and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's access authorization should be restored. I find that granting the individual's DOE security clearance will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

A. Guideline E

The LSO's Guideline E security concern arises from the individual's statement to the DOE psychologist that he had abstained from alcohol since his January 2016 arrest, and a blood test that provided strong evidence that he had in fact consumed alcohol within the preceding 21 to 28 days.[3] At the hearing, the individual described his decision to claim abstinence falsely as an act of desperation, committed because he was afraid that he would lose "everything [he] had worked so hard for." He acknowledged his misrepresentation within the first day after committing it, to his wife, his supervisor, and a number of others, and to his counselor shortly thereafter. All of those admissions took place before he learned that a laboratory test had established that he had in fact consumed alcohol during the period of his claimed abstinence. In addition, at the hearing, the individual took the opportunity to apologize to the DOE psychologist for having misrepresented his alcohol use during the evaluation. Tr. at 30.

One condition stated in the Adjudicative Guidelines for mitigating a Guideline E concern is "prompt, good-faith efforts to correct the . . . falsification before being confronted with the facts." Guideline E at ¶ 17(a). I acknowledge that the individual felt remorseful about his decision to misstate his abstinence to the DOE psychologist almost immediately after doing so, and revealed his falsification to several persons. I also recognize, however, that he did not reveal that falsification either to the LSO or to the DOE psychologist. Consequently, while I cannot conclude that the individual's behavior following his falsification entirely resolves the LSO's concerns for his honesty, it is a factor to be considered in an overall, whole-person evaluation of his eligibility to hold a security clearance. In a similar vein, I also consider the fact that the individual was under no obligation to be abstinent at the time of his evaluation. Tr. at 90-91. Therefore, the individual could have told the DOE psychologist the truth about having consumed three beers eleven days before their meeting at little risk to his evaluation. Because he decided to conceal that fact, it is my opinion that he panicked at the questioning and presented himself in a falsely positive light.

[3] The record indicates that the individual similarly misrepresented the truth during a 2006 PSI when he told the interviewer that he had been abstinent since 2003. I note that the LSO did not raise this incident as a concern under Guideline E and, though the DOE psychologist acknowledged it in his evaluative report, he did not flag it as a matter of concern to him. Ex. 4 at 3. Neither the LSO nor the DOE psychologist raised a concern based on a pattern of misrepresentation; in fact, the DOE psychologist found no generalized dishonesty, despite his awareness of both the 2006 and 2016 lies. I will therefore address only that stated concern, as described above.

Other mitigating conditions weigh more clearly in the individual's favor. Although the falsification was fairly recent, it appears to be an isolated event, in that the individual has a reputation for reliability and honesty, and it is unlikely to recur. Guideline E at ¶ 17(c). In addition, the individual has acknowledged the behavior and obtained counseling to address that behavior, as he continues to see his counselor on an *ad hoc* basis, even though he long ago completed the alcohol education program for which he initially saw her. Guideline E at ¶ 17(d). Given the consistent nature of the evidence and the testimony regarding his reputation for honesty and reliability, his acknowledgment of his behavior, and his demonstration of remorse, I find that the individual has adequately addressed the LSO's concerns about his honesty and reliability that were raised by his misrepresentation of his abstinence to the DOE psychologist. Therefore, I conclude that the security concern raised under Guideline E has been resolved.

B. Guideline J

The criminal conduct that the LSO identified in the Notification Letter falls into two categories: a series of arrests and citations from 1996 to 2002, and a single arrest for DWI in 2016, separated by a gap of nearly 14 years. With respect to the series of arrests and citations from 1996 to 2002, the individual has explained that the cluster of criminal conduct occurred when he was young and trying to be accepted by his peers. The record reflects that he has matured into a different person, a responsible adult who no longer routinely violates laws but rather devotes himself to his family, his church, and his community. His counselor testified that the individual's path toward adulthood is by no means uncommon. In light of the record produced in this proceeding, I find that two of the mitigating conditions set forth in the Adjudicative Guidelines apply here: so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not case doubt on the individual's reliability, trustworthiness, or good judgment (Guideline J at ¶ 32(a)); and the individual was pressured or coerced into committing the acts and those pressures are no longer present in his life (Guideline J at ¶ 32(b)). Accordingly, I conclude that the security concerns raised by the individual's criminal conduct from 1996 to 2002 have been resolved.

The remaining criminal event, the January 2016 DWI arrest, is a more serious matter, particularly in light of the recency of the conduct. Nevertheless, it stands alone as the only criminal activity between May 2002 and the date of the hearing, over 15 years later. I find that it resulted from an error in judgment, a belief that he was capable of driving after drinking because he had eaten as well, rather than from a deliberate flouting of state law. The individual testified that he is committed to preventing its recurrence, stating that "If I ever drink again, . . . I will never, ever, ever get behind the wheel." Tr. at 98. The credibility of this assertion is enhanced by the individual's statement that the 18 months since the DWI arrest have been "rough." *Id.* Applying the most applicable mitigating factor in Guideline J, I find that there has been no new criminal conduct since the arrest; that he has expressed remorse over the incident, according to his counselor; that he continues to maintain a superior employment record, according to his supervisors and colleague; and that he is active in constructive community endeavors, including his church and his coaching of youth basketball. Guideline J at ¶ 32(d). In addition, he completed an alcohol education program with his counselor, which adds to the likelihood that future DWI behavior will not recur. I have therefore determined that the individual has resolved the security concern raised by his recent DWI arrest.

VI. Conclusion

Upon consideration of the entire record in this case, I find that there was evidence that raised concerns regarding the individual's eligibility for a security clearance under Guidelines E and J of the Part 710 regulations. I also find, however, that the individual has presented sufficient information to fully resolve those concerns. Therefore, I conclude that restoring the individual's DOE access authorization to the individual "will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the DOE should restore the individual's access authorization.

William M. Schwartz
Administrative Judge
Office of Hearings and Appeals

Date: August 8, 2017